APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of June, one thousand nine hundred and eighty-two.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE RALPH K. WINTER,

Circuit Judges,

HONORABLE ROBERT J. WARD,

District Judge, sitting by designation

UNITED STATES OF AMERICA,

Appellee,

v.

81-1476
81-1480
81-1482

GABRIEL OUTMEZGIUNE, RAFAEL SAADON, and RAFAEL BEN-NATAN,

Appellants.

Appendix A

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

1. Appellants Rafael Saadon and Gabriel Outmezgiune claim that Judge Bramwell erred in refusing to give the entrapment charge requested. In this Circuit, if the defendant adduces some evidence of inducement by the Government, the prosecution then has the burden of establishing the defendant's propensity to commit the crime *United States v. Valencia*, 645 F. 2d 1158, 1166 (2d Cir. 1980); *United States v. Sherman*, 200 F. 2d 880, 882-83 (2d Cir. 1952). Assuming that Saadon and Outmezgiune met their burden, the entrapment charge was not necessary "if uncontradicted proof has established that the accused was 'ready and willing without persuasion' and to have been 'awaiting any propitious opportunity to commit the offense.' " *United States v. Riley*, 363 F. 2d 955, 959 (2d Cir. 1966). The propensity of Saadon and Outmezgiune to commit the crimes was established overwhelmingly. They instantly accepted the suggestion that they purchase the heroin from France. They were able to deliver heroin to the Drug Enforcement

Administration (DEA) informant Marcel Atties on the very day he asked for it. They possessed large amounts of cash which indicated that they were substantial and frequent drug traffickers. Saadon and Outmezgiune adduced nothing to contradict this evidence of propensity. Accordingly, under the circumstances, it was not erroneous for the trial judge to refuse to charge the jury on entrapment. *United States v. Licursi,* 525 F. 2d 1164, 1168-69 (2d Cir. 1975).

2. Appellant Saadon contends that Judge Bramwell improperly refused to charge the jury that "the fact that a person may have been in a state of drug-induced stupor at the time of the commission of a crime may negative the existence of specific intent." There was simply no evidence, however, indicating that Saadon's drug addition [sic] led him to be so consistently under the influence of drugs that he was unable to form the mental intent necessary to commit the crimes charged. *See United States v. Busic,* 592 F. 2d 13, 21 (2d Cir. 1978).

3. Appellant Saadon also argues that the Government's conduct in this case was so shocking as to violate the Due Process Clause of the Fifth Amendment in that the Government agents supplied Saadon with 2 grams of heroin which was from 89%—91% pure knowing that he was a heroin addict likely to ingest it thus risking Saadon's life. This claim is without merit. Supplying heroin samples during a narcotics

investigation can hardly be labelled "egregious". *Cf. United States v. Alexandro,* No. 81-1435, slip op. at 1718 (2d Cir. Mar. 18, 1982). The purity of the heroin was essential since it was supposed to be a sample of the uncut heroin coming in from France.

4. There was ample evidence to support the conviction of appellant Rafael Ben-Natan. The standard on review is whether " 'upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.' " *United States v. Rivera,* 513 F. 2d 519, 529 (2d Cir.), *cert. denied,* 423 U.S. 948 (1975). Ben-Natan was frequently sighted by DEA agents in or near Saadon's car while Saadon was meeting with Atties and discussing the importation of heroin from France. He participated in a meeting on May 13, 1981 with Saadon, Atties and Outmezgiune and warned them to be careful of possible surveillance. In addition, one of the safety deposit boxes containing the money to be used for the purchase which was shown by Saadon to Atties belonged to Ben-Natan and he held a power of attorney over another box. The evidence sufficiently demonstrated that Ben-Natan was a knowing participant of the conspiracy.

5. Appellants' other claims are equally without merit.

6. Accordingly, the judgments are affirmed.

Appendix A

s/ Irving R. Kaufman
IRVING R. KAUFMAN,

s/ Ralph K. Winter
RALPH K. WINTER,
Circuit Judges.

s/ Robert J. Ward
ROBERT J. WARD,
District Judge.